IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 950 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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ASHOK MOLTAJI DARJI - Appellant

Versus

STATE OF GUJARAT - Opponent

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Appearance :
MR DEEPAK M SHAH for the Appellant.
THROUGH JAIL for the Appellant.
MR ND GOHIL, ADDITIONAL PUBLIC PROSECUTOR for the Opponent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 24/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. Instant appeal is preferred by the appellant under Section 374 (2) of the Code of Criminal Procedure, 1973, against the judgment rendered by the learned Additional

Sessions Judge, Ahmedabad City in Sessions Case No. 10 of 2001, whereby the learned Additional Sessions Judge has convicted the appellant under Sections 17 and 18 of the Narcotic and Psychotropic Substances Act, 1985 (*"the Act"*, for short), and sentenced the appellant to RI for 10 years and fine of Rs.1,00,000/- (Rupees One Lakh Only), in default RI for 2 years, under Section 17, and RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default RI for 2 years, under Section 18 of the Act. The learned Additional Sessions Judge has passed the order that the substantive sentences shall run concurrently.

2. The short facts giving rise to the present appeal are stated hereinbelow:

On 19-10-1999, Mr. Mukund Balwantsinh Raj, who was working as PSI in the DCB Crime Branch, received information from Police Constable Prahladsinh Tejuba and Police Constable Valji Laxmanbhai that the appellant along with two other accused, was to pass through *Lala Kaka Market*, situated near *Dilli Darwaja*, Ahmedabad and each was in possession of *opium*. The information received by him was reduced into writing in the Station

Diary and the report regarding the same was forwarded to his immediate official superior i.e. Assistant Commissioner of Police, Crime Branch, Ahmedabad. Thereafter, Police Constable Rajendrasinh was requested to call two *panch-witnesses*. The two *panch-witnesses,* who were summoned, expressed their willingness to act as *panch-witnesses.* Therefore, they were informed about the information received. The first part of the *panchnama* was prepared at the Police Station itself. Thereafter, the raiding party went in two Government vehicles to the place where the raid was required to be carried out. The members of the raiding party maintained vigil on the public road outside *Lala Kaka* Market near *Dilli Darwaja*. Mr. G. D. Sharma, expert from Forensic Science Laboratory (FSL), was also summoned at the scene of offence. At about 1615 Hrs, the appellant and other two accused, who were answering description given in the secret information, were found passing through the road and they were intercepted by the raiding party. Before embarking on search of the person of the appellant and others, the appellant was given the option to have search of his person in the presence of a Gazetted Officer or a Magistrate. The appellant declined that offer. Thereafter, the search of the person of appellant was

carried out. He was found in possession of one blue-gray coloured cloth bag. On opening the said bag, one blue coloured plastic-bag was found wherein black coloured substance of uneven shape was found. No cash was recovered from the appellant. The FSL expert i.e. Mr. Sharma examined the offending substance found from the possession of the appellant and opined that the substance which was seized from the appellant was *opium*. *Opium* was weighed in presence of *panch-witnesses* and its weight was found to be 400 Grams. Out of that, *muddamal* weighing 25 Grams was drawn and sealed, as required by law. Another reserve sample of 25 Grams was also prepared and sealed, as required by law. The remaining contraband article was kept in a separate plastic bag and heat-sealed. Thereafter, the second part of *panchnama* was prepared in the presence of *panch-witnesses*. *Muddamal*, complaint, arrest memo, etc. were handed-over to Harnamsinh Danramsinh, who was working as PSO in the City Crime Branch, Anti-Dacoity and Robbery Squad, Ahmedabad, by PSI Mr. M. B. Raj. On the basis of the said report, the offence was registered against the appellant and necessary entry in that regard was made in the Station Diary. Thereafter, the seized *muddamal* was sent to FSL for the purpose of detailed analysis. The subsequent

investigation was conducted by Dalpat Himatsinh Sodha, who was working as PSI in DCB, Crime Branch, Ahmedabad. On entrustment of the investigation, he perused the complaint, *panchnama*, etc. The statement of the witnesses found to be conversant with facts of case were recorded by him and the search of the house of the appellant and other places was also conducted by him. On his transfer to Banaskantha District, the investigation was handed-over to Mr. M. B. Raj and Mr. M. B. Raj filed the chargesheet against the appellant as the investigation was over. On the basis of chargesheet, Sessions Case No. 10 of 2000 was registered against the appellant in the Court of learned Additional Sessions Judge, Ahmedabad.

3. The charge against the appellant and others was framed *vide* Exh. 6 for the offences punishable under Sections 17, 18 and 29 of the Act. It was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined following witnesses to prove its case against the appellant:

(i) PW 1, PSO Mukundsinh Balwantsinh Raj, at Exh. 21;

(ii) PW 2, Witness Bharatbhai Ranchodbhai Bodana, at Exh. 24;

(iii) PW 3, PSI Rumalji Shivaji, at Exh. 39;

(iv) PW 4, Retired PI Mr. Madarsinh Bhikhaji Solanki, at Exh. 41;

(v) PW 5 Akaldas Raghuram Pandya, at Exh. 60;

(vi) PW 6 PSO Harnamsinh Daniramsinh, at Exh. 62; and,

(vii) PSI Dalpatsinh Himatsinh Sodha, at Exh. 65.

The prosecution also placed reliance on documentary evidence in support of the oral deposition adduced by it. The documentary evidence produced is as under:

(i) Complaint by PSI Mr. M. B. Raj, Narcotic Squad, Crime Branch, Ahmedabad, at Exh. 22;

(ii) entries of *muddamal* made in the *Anamati* Register, at Exh. 40;

(iii) report under Section 42 (2) prepared by PI Mr. M. B. Solanki and forwarded to Assistant Commissioner of Police, at Exh. 43;

(iv) *panchnama* of the raid, which was carried out, at Exh. 44;

(v) offer of search given to the appellant

under Section 50 of the NDPS, at Exh. 49;

(vi) understanding given to the appellant before carrying out the search of his person, at Exh. 50;

(vii) seizure memo given by PI Mr. M. B. Solanki, at Exh. 51;

(viii) grounds of detention given to the appellant, at Exh. 52;

(ix) report prepared under Section 57 of the Code of Criminal Procedure Code by PI Mr. M. B. Solanki and forwarded to the Charge Officer, DCB, Ahmedabad City, at Exh. 57;

(x) intimation of arrest of the appellant, which was given to the higher official by PI Mr. M. B. Solanki, at Exh. 58;

(xi) note, which was sent to FSL, at Exh. 59;

(xii) report given by Assistant Director, FSL, Ahmedabad to the Police Inspector, at Exh. 61;

(xiii) extracts of the entries made in the Station Diary maintained at Police Station, DCB Office, Ahmedabad, at Exhs. 63 and 64; and,

(xiv) report of the FSL, at Exh. 66.

4. At the conclusion of the trial, further statement of

the appellant was recorded under Section 313 of the Code of Criminal Procedure, 1973 and the circumstances against the appellant were also explained to him. The appellant took the plea that a false case was foisted on him, but did not lead any defence evidence.

5. On appreciation of oral deposition and the documentary evidence, the learned Additional Sessions Judge held that mandatory provisions contained in Sections 42 (2) as well as 50 were complied with by the prosecution. The learned Judge held that it was proved by the prosecution that the appellant was found in possession of 400 Grams of *opium* and commission of offences under Sections 17 and 18 of the Act was established. The learned Additional Sessions Judge further held that the report of the analysis given by FSL corroborated oral deposition adduced by the prosecution. Thus, the learned Additional Sessions Judge passed the order of conviction against the appellant and sentenced him to RI for 10 years and fine of Rs. 1,00,000/-, in default RI for 2 years, under Section 17 of the Act, as well as RI for 10 years and fine of Rs. 1,00,000/-, in default RI for 2 years, under Section 18 of the Act, giving rise to the present appeal.

6. This Court has heard Mr. D.M. Shah, learned Counsel of the appellant and Mr. N.D. Gohil, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

7. The learned Advocate representing the appellant submitted that on perusal of the oral deposition and documentary evidence, it is clear that the prosecution has miserably failed to prove that the appellant was found in conscious possession of 400 Grams of *opium* and, therefore, the appeal should be allowed. On perusal of the evidence adduced by PSI M. B. Raj, PW 1, at Exh. 21, it becomes clear that on the strength of the information given by Police Constable Valjibhai Laxmanbhai and Police Constable Prahladsinh Tejuba, raid was carried out on 19-10-1999. After going to the place situated near *Dilli Darwaja*, the appellant and two other accused were found passing through the *Lala Kaka* Market, and were intercepted by PSI Mr. M. B. Raj and other members of the raiding party. When the person of the appellant was

searched in the presence of *panch-witnesses* and other members of the raiding party, he was found in possession of 400 Grams of *opium*. The deposition adduced by PSI Mr. M. B. Raj gets necessary support and corroboration if we peruse deposition of independent witness i.e. witness Bharatbhai Ranchodbhai Bodana, PW 2 at Exh. 24 and the deposition of Police official Akkaldas Pandya, PW 5, at Exh. 60. The testimony of PSI Mr. M. B. Raj also gets corroboration from the contents of the complaint (Exh. 22) and *panchnama* (Exh. 44) of place of incident as well as report forwarded to his immediate official superior under Section 42 (2) of the Act. Therefore, the argument, that the prosecution has not proved that the appellant was found in conscious possession of 400 Grams of *opium,* has no substance and is hereby rejected.

The learned Advocate contended that provisions contained in Section 42 (2) were not complied with inasmuch as the information which was reduced into writing under Section 42 (1) was not forwarded to the immediate official superior and, therefore, the appellant is entitled to be acquitted. This contention is without any substance. On bare perusal of Section 42, it becomes very clear that when the search is carried out in a building or a conveyance or an enclosed place, then the

aforesaid provisions would come into play. The fact that the search of the person of the appellant was carried out in a public place i.e. near *Lala Kaka* Market, situated on the *Dilli Darwaja* Road, is not disputed. The evidence makes it abundantly clear that the search was not carried out in an enclosed place or a building or a conveyance and, therefore, provisions of Section 42 of the Act would have no applicability to the facts of the present case in view of catena of decisions rendered by Apex Court, including those rendered in: (1) **Rajendra And Another Vs. State of M. P., (2004) 1 SCC 432**; (2) **Krishna Kanwar (Smt.) alias Thakuraeen Vs. State of Rajasthan, (2004) 2 SCC 608**; and, (3) **State of Haryana Vs. Jarnail Singh and Others, (2004) 5 SCC 188.** Even otherwise, the record establishes that information was reduced into writing, as required by Section 42 (1) of the Act. This fact is assertively deposed to by PSI Mr. Raj. He is fully corroborated by contemporary document on record, which is produced at Exh. 40. The record further shows that necessary report, as required by Section 42 (2) of the Act, was forwarded by him to his immediate official superior, and it is produced at Exh. 43. Thus, the evidence on record satisfactorily establishes that the provisions of Section 42 were strictly complied with and,

therefore, the contention, that mandatory provisions of Section 42 were not complied with, is rejected. Further, the plea that a false case was foisted upon the appellant is not probabilised by leading any evidence. It could not be even remotely suggested either to PSI Mr. M. B. Raj, who carried out the raid, or any of the members of the raiding party, that they were on inimical terms with the appellant. Therefore, false implication of the appellant stands completely ruled out.

The contention raised by the learned Advocate that the search of the appellant was not carried out as provided under Section 50 of the Act in the presence of a Gazetted Officer or a Magistrate is devoid of any merit. According to the prosecution, what was searched was cotton bag carried by the appellant and not his person. This fact is mentioned in the evidence of the relevant witnesses as well as *panchnama,* Exh. 44, and the complaint, Exh. 22. It is nobody's case that the body of the appellant was searched. Therefore, the provisions of Section 50 would not be applicable to the facts of the case. This is so in view of **State of H. P. Vs. Pawan Kumar, (2005) 4 SCC 350**. Even otherwise, the evidence on record clinchingly establishes that the provisions of

Section 50 were complied with by PSI Mr. M. B. Raj before effecting search of the cotton bag carried by the appellant. PSI Mr. Raj, in his testimony, has asserted that he had offered the appellant to be searched in presence of a Magistrate or a Gazetted Officer before effecting search of his bag and that the said offer was declined by the appellant. This assertion could not be demonstrated to be false. This assertion gets complete corroboration from the testimony of other witnesses as well as contents of *panchnama,* Exh. 44, and complaint, Exh. 22. There is no manner of doubt that provisions of Section 50 were fully complied with before effecting search of the bag of the appellant and, therefore, no benefit can be given to the appellant on the ground that mandatory provisions of Section 50 of the Act were not complied with.

The learned Advocate further submitted that on perusal of the entire oral deposition and the documentary evidence, it becomes clear that the recovery of *opium* from possession of the appellant was only 400 Grams and as the punishment imposed on the appellant is quite harsh, the same should be reduced taking into account the fact that only 400 Grams of *opium* was recovered from his

possession. This argument canvassed by the learned Advocate, on perusal of the entire oral deposition and the documentary evidence is, in our view, without any substance. This Court finds that the present case is governed by provisions of the Act as it stood before its amendment by amending Act No. 9 of 2001. Under the unamended provisions, minimum punishment was prescribed, which is imposed and, therefore, no case is made out to interfere with the same in instant appeal.

However, we notice that the learned Judge while imposing fine of Rs. 1,00,000/- has directed that the appellant shall undergo punishment of RI for 2 years if he does not pay fine of Rs. 1,00,000/-. This, in our opinion, is uncalled for and the punishment in default, provided by the learned Judge, should have been RI for 1 year. To this extent, the sentence imposed deserves to be modified.

8. For the foregoing reasons, the appeal partly succeeds. Judgment dated August 10, 2000 rendered by learned Additional City Sessions Judge, Court No. 11, Ahmedabad City in Sessions Case No. 10 of 2001, convicting the appellant under Sections 17 and 18 of the

N.D.P.S. Act, 1985 is upheld, and for commission of each offence, the appellant is sentenced to RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default RI for 1 year. The appeal stands allowed only to the extent indicated hereinabove. *Muddamal* be disposed of in terms of the directions issued by the learned Judge in the impugned judgment.

[J. M. PANCHAL, J.]

[H. B. ANTANI, J.]

/shamnath